

HAYEK AND COOTER ON CUSTOM AND REASON

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I came to the conference a little uncertain about how to handle the assignment of a commentator on a paper by a distinguished economist at a symposium on Hayek. I cannot claim any expertise either about Hayek's thought or about law and economics, other than an interested tourist's acquaintance with either. Yet, both Professor Cooter's paper¹ and much of Hayek's legal theory touch on an issue familiar to all legal historians. It is perhaps the oldest and most contested of all issues in legal thought and practice, that of the relations between law and custom, both as they are and as they should be. There are revealing differences on this issue between (what I understand to be) Cooter's approach and Hayek's approach.

Both Cooter and Hayek have a great regard for "spontaneous orders" — norms and conventions emerging over time from continuous practices of interaction.² For a legal system, consulting such spontaneously evolved orders helps to solve the awesome difficulties of obtaining enough information to come up with just and efficient rules for the resolution of disputes, just as the price signals emanating spontaneously from markets overcome the insuperable information barriers to rational central planning. The spontaneous order is presumptively efficient, or latently functional, as sociologists put it, even though individual participants themselves may be unaware of its functions and how their order serves it. It is rational at the system level, not at the individual level.

Yet, on closer inspection, I think Hayek's treatment of a particular set of spontaneous orders, that of customary communities, is quite different from Cooter's. Cooter is willing to accept any community's

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1. Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 Sw. U. L. Rev. 443 (1994).

2. *See id.* at 447-49.

customary norms as presumptively good for adoption by the legal system.³ In other words, the law is likely to function best by tracking the customary norms. Under common law terminology, any custom, or at least any custom evolved from the “appropriate set of incentive structures,” is presumptively *reasonable*. Cooter recognizes exceptions where there may be problems of spillovers, exploitation, or non-convexity.⁴ These exceptions are numerous, when you add them all up, and it is fair to ask whether having a court resolve in every case whether a customary norm fits into one of the exceptions does not vitiate many of the scheme’s information-saving virtues.

In contrast, Hayek is decidedly more ambivalent about customary communities. Apparently, the kind of spontaneous order he most admires is the kind developed in the most abstract markets—markets not “embedded” in face-to-face relationships, kinship or religious ties, in craft guilds obeying a traditional regulatory order or in local customary practices. By analogy, he extends his admiration for the spontaneous order of markets to the “common law”—whose judges, like market actors, are constantly making interstitial adjustments to a dynamic ongoing system of practices that is not the deliberate rational construction of any single social agent. He refers with approval to the legal theorists of the evolutionary common-law mind, Mathew Hale, Blackstone, Burke, Savigny—all of whom locate the common law’s genius in its tracking of social custom, at least “reasonable” custom: In its “English” or “bottom-up” character as opposed to “French” or “top-down” systems, what Hayek calls “constructivist” systems.⁵

However, the common law theorists have always had a tough time straddling the divide between custom and reason, trying to reconcile the particularistic, case-centered, precedent-oriented, local-jury reliant, local usage-respecting tendencies of the common law method, with the common law’s generalizing and universalizing tendencies. Such generalizations include the ideal of common law as a science of principals of which the cases and particular judgments are only illustrations, and often mistaken illustrations at that, to be cast out to the extent they may mar the harmony and order of the general science and further as a *common* law, a law for the realm as a whole.

3. See generally *id.* at 446, 449.

4. See *id.* at 450.

5. See, e.g., FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 54-70 (1960) [hereinafter CONSTITUTION OF LIBERTY]; FRIEDRICH A. HAYEK, 1 LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 17-34, 72-74, 118-23 (1973) [hereinafter RULES AND ORDER].

On the whole, I believe that in these historical divisions there can be little doubt on which side Hayek is usually found. Despite bows to the common law's evolutionary particularism, he sides with the abstracters and generalizers. His legal ideal is that of a system of formal, gender-neutral "rules of just conduct," applying equally to all and not designed with the satisfaction in mind of any local community's or associations' purposes.⁶ A general legal order, if it remains general in application (a big "if" that I will come back to), cannot be a customary one, since custom is irreducibly local and particular. The lawyers of the classical period (approximately 1860-1920) tried to mediate the tension between custom and reason in many of the same ways as Hayek. First, Hayek argues that the law does not support every customary expectation, but only such as are reasonable, as those expectations are required to maintain an "ongoing order of actions."⁷ Second, Hayek ingeniously postulates that the law has gradually evolved towards its present tendency to approximate a system of general-abstract principles.

At this level of the debate, however, we can learn very little that is important about the tension between custom and reason in the law. For however general rules or standards may be in their formulation, at the moment of their application they are invariably concrete. For example, it makes a big difference whether, in the interpretation of contractual or testamentary intentions or in constructing the duties and capacity to foresee harms from conduct, the court relies on a lawyer's reading, a trade expert's reading, a hypothetical "reasonable man's" reading, or a lay jury's reading of facts and norms, and what procedures it chooses to ascertain these. Medieval law's claim to be "customary", which is the claim carried over into Hale, Burke and Hayek, rested on a specific procedure by which issues of customary norms and practices were resolved by local juries: They reported to the court the local customs they knew, and if the custom was ambiguous or contested, as it often was, they reported it as it should be, that is, as a negotiated consensus among themselves as to what it should be. As this procedure gradually fell into decay, judges began referring to the judgments of prior *courts* as the best evidence of custom; but this was clearly becoming a wholly fictional custom, and one that opened a great gulf in many fields between local or lay expectations and the

6. See CONSTITUTION OF LIBERTY, *supra* note 5, at 148-61; RULES AND ORDER, *supra* note 5, at 85-88; FRIEDRICH A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 11-30 (1976) [hereinafter MIRAGE].

7. RULES AND ORDER, *supra* note 5, at 98.

common lawyers.⁸ Thus the common law evolved, but in directions often entirely at odds with the communities it regulated. Sometimes, although rarely, the common law refreshed itself at the source by dipping back into custom. Cooter refers to Lord Mansfield's contributions to incorporating the law merchant into the common law. This was partly accomplished, of course, by Mansfield's empaneling of special juries of merchant experts, who debated among themselves about what commercial custom should be, and reported the results to the court.⁹ Karl Llewellyn had in mind a similar scheme for the Uniform Commercial Code. He proposed special merchant tribunals to infuse trade wisdom on both usages and norms into the decision of sales disputes. His special procedure was rejected, probably because the other lawyers involved in drafting the Code were reluctant to abandon the "legal" standards they were used to for the uncertainty—uncertainty for the lawyers, that is, not necessarily for the parties—of trade determined facts and norms.¹⁰

So at the moment of application, choices must be made among contending normative orders and interpretive communities. Choices between conflicting orders within communities, between those communities and the outside world, between the norms of local markets and customs and the norms of—actual or hypothesized—global markets and *their* customs, and between all of those customs and those of the law. If your general rules are open-ended standards, such as the Uniform Commercial Code's standards of "reasonableness" or "good faith," their generality is a formal shell. Any actual content must be filled in by local particulars or context-specific rules of thumb. If, on the other hand, the legal rules are formally-realizable bright-line rules, like a rule requiring a writing to make a contract enforceable, then the rule is bound to cut across the grain of custom—in this example, the custom of communities with informal modes of creating obligations.

For this reader, Hayek's legal theory is disappointingly unilluminating on these issues, because in the texts in which he has most to say about law—*Law Legislation and Liberty*¹¹ and *The Constitution*

8. See generally James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (discussing problems faced by legal scholars, jurists and lawyers in ascertaining local custom, which was the foundation of Medieval law).

9. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 99-121 (1989) (discussing Lord Chief Justice Mansfield's contributions to the development of the commercial law).

10. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 512-15, 527-29 (1987).

11. See RULES AND ORDER, *supra* note 5; MIRAGE, *supra* note 6.

of Liberty¹²—he says so little that would help one think through these matters. However, I think the reader may plainly infer a bias toward the global norms, that is, the norms of the spontaneous orders generated between trading communities of strangers, and against those of more particularistic relational obligations generated within local communities (Cooter's¹³ or Robert Ellickson's¹⁴ normative communities). Hayek has a similar bias toward the general in legal method—toward formality and uniformity in interpretation, toward the judge over the jury for the sake of consistency and abstract (status indifferent) justice, toward rules over standards.¹⁵ I suppose in turn these preferences have to do with his ambivalence toward customary communities. These communities sometimes appear in Hayek's work as good things, (e.g. voluntary associations), but much more often as reactionary ones—as “teleocratic” rather than “nomocratic” organizations, organized around the pursuit of specific purposes rather than general rules, as the “tribal horde” of face-to-face relationships whose atavistic instinct to satisfy the needs of known persons subverts market rationality and becomes the breeding ground of utopian-socialist fantasies, or as the protectionist craft or interest-group cartel that tries to use special legislation to confirm its privileges against competition or dynamic erosion.¹⁶

Hayek's priorities are in effect the reverse of Cooter's. Cooter says that for the settlement of intra-community disputes, local custom furnishes the efficient norm; and that the legal system's constructivist, or default norms, should be reserved for the disputes of strangers (members of different non-overlapping communities).¹⁷ This makes sense because it restates private law's familiar distinctions between norm-ascertainment methods appropriate to contracts and torts. It does not tell us, of course, how to identify the relevant community among nested communities, or how to treat the stranger or newcomer to a relational order on the community's home ground, but it is certainly inclined to recognize the latent efficiencies of customary communities.

12. See CONSTITUTION OF LIBERTY, *supra* note 5.

13. See, e.g., Cooter, *supra* note 1, at 449.

14. I refer here to ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (admiring study of normative order generated indifferently to formal legal rules by Shasta County, California cattle ranchers).

15. I extrapolate these biases entirely by inference. Hayek's concept of law is exclusively one of law as *rules*. In his principal works on law there are no references to any fact-finding or law-application procedures or agents, such as witnesses or juries.

16. See MIRAGE, *supra* note 6, at 133-52.

17. See Cooter, *supra* note 1, at 450-51.

To the extent he wants them at all, Hayek wants such community customs to prove their worth through their ability to survive in an ongoing order structured by formal-general rules, without being able to recruit the law's coercive power to the service of their collective purpose.¹⁸ But of course, the competition for survival is rigged by the legal order itself, by how the law decides at the moment of application to choose among competing sources of custom. Applications of the legal order's general rules may either underwrite or subvert the norms and practices of customary communities. The application of formal legal rules of the type that support an abstract market of interactions between strangers may wreak havoc upon customary communities, pulverizing the system of mutual restraints, loyalties, reciprocities and local sanctions that has made the community work.

Let me illustrate by providing an example from a place and period in which Hayek himself was intensely interested:¹⁹ The great alteration in English agrarian practices that preceded the Industrial Revolution. Two legal developments in particular profoundly affected customary practices in early modern England: The Parliamentary enclosure of common fields, and the gradual extinction of customary common use-rights. Such rights include property rights to graze beasts, gather wood, or take deer, and were vested in tenants or villagers and coexisting with the proprietary rights of farmers or landlords. This second movement is often described by social historians as the legal conversion of customs to crimes.

Hayek, looking at the history of the common law, saw in these developments a gradual evolution toward classical-general forms of property—especially the form of absolute ownership rights, agglomerated in a single owner to the exclusion of conflicting or co-existent rights not granted by contract. But to the villagers involved, these legal changes imposed by a distant central authority were experienced as violent intrusions upon *their* customary order. Where they once had gathered by right, they were now met with the spring-gun and the

18. See, e.g., RULES AND ORDER, *supra* note 5, at 99. "[T]he groups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order. The rules that will spread will be those governing the practice or customs existing in different groups which make some groups stronger than others." (citations omitted). *Id.*

19. See FRIEDRICH A. HAYEK, CAPITALISM AND THE HISTORIANS (1954) (compilation of papers which served as the basis for a meeting of the Mont Pelerin Society in France in 1951; one of the topics of the meeting was the treatment of capitalism by the historians).

gallows. They were made, as E.P. Thompson has said, "strangers in their own land."²⁰

The famous case of the Gleaners, *Steel v. Houghton*,²¹ will serve as my example. Gleaning is the custom by right of which the poor may enter the farmer's land after the harvest to gather any scattered corn left lying on the ground. In a test case decided in 1788, the Court of Common Pleas held that gleaning could not be a custom that common law could recognize as a right, because, said one of the judges, it was "inconsistent with the nature of property which imports exclusive enjoyment."²² Another said: "[n]o right can exist in common law, unless both the subject of it, and they who claim it, are certain. . . . The subject is the scattered corn which the farmer chooses to leave on the ground. . . . The soil is his, the seed is his, and in natural justice so are the profits."²³ To the gleaners, none of this had the sound of spontaneous order. It was as abstract, as ideological, as alien and as ruthless as any Socialist Central Plan.

In retrospect, some of these quaint regimes of common customary rights have come to be more appreciated for their latent functions. We have traveled a long way from Hardin's thesis of the "Tragedy of the Commons"²⁴ to realize that relational communities, if allowed to evolve their own norms and sanctions, may achieve by experiment quite efficient regimes: mutual-insurance schemes to allocate the risks of famines or shortages or seasonal employment, or the hidden efficiencies of trust, morale and motivation, social stability, and protection against opportunism that results from bonding people through relational rights and duties.²⁵ The pre-industrial English cottager's economy, as E.P. Thompson noted ironically in one of his last essays, is now recognized as a model "proto-industrial" economy of small producers associated through relational ties (like the small workshops of the modern North Italian "miracle"), and in some respects, under

20. E.P. THOMPSON, CUSTOMS IN COMMON 184 (1993).

21. *Steel v. Houghton*, 126 Eng. Rep. 32 (1788).

22. *Id.* at 33.

23. *Id.* at 38.

24. Garrett Hardin, *The Tragedy of the Commons*, in MANAGING THE COMMONS 16 (Garrett Hardin & John Baden eds., 1977) (ownership in common leads to overgrazing so as to lay waste to the commons).

25. For a sampling of the enormous literature on this point, see, e.g., GEORGE A. AKERLOF, AN ECONOMIC THEORIST'S BOOK OF TALES (1984); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (discussing public and private property, and explaining why some property should remain public and not reduced to exclusive control); ALAN FOX, BEYOND CONTRACT: WORK, TRUST AND POWER RELATIONS (1974); IAN MACNEIL, THE NEW SOCIAL CONTRACT (1980).

appropriate market conditions, is considerably more "efficient" than the factories that superseded them.²⁶

A final word on the relation between law and custom, also drawn from the history of the gleaners and their hapless claims to community property. The case was decided in 1788. Yet as we know from a series of close-up studies by the historian Peter King, it took many years before the new central-legal regime had much actual effect on agrarian practices. Localism was also a strong legal tradition; and in this case the weight of local custom and opinion fell against the landowners. Gleaners, usually women, continued to enter land after the harvest to pick up the scattered grain, although considered trespassers at common law. Local custom, which could be specially pleaded in local courts, still supported their claim of right. When a farmer had a gleaner physically thrown off the land, she would return with thirty or forty fellow villagers. Farmers who laid violent hands on the gleaners were sometimes prosecuted in local courts, and often fined. The local Justices of the Peace felt no tenderness toward farmers who beat up on women. Of course, the farmers had their own informal sanctions, like denying access to job networks, that they could and did deploy against gleaners' families.²⁷

The point is that the "spontaneous order" of community customs is tough, and not easily penetrated or altered by outside decrees. Law can not be seen as a system of rules that acts directly on individuals. It is one order amid a plurality of normative orders, a rival of local law and custom. And custom itself, like law, is not a unitary order but a dynamic process, not just of adaptation, but of ongoing conflict and shifting power alignments.

This Comment is not intended as a paean to customary communities and their customary orders. Such orders can be terrible and oppressive orders, for all the reasons that Hayek gives for distrusting organizations and tribes, and that Cooter gives in his catalogue of exceptions to presumptively-valid customs. Yet social orders that evolved in the shadow and under the compulsions of the Rule of Law, the common-law *Rechtstaat*, can be oppressive orders as well. Everything, in these matters, depends on how the interactions between law and custom are played out in detail.

26. See THOMPSON, *supra* note 20, at 176.

27. Peter King, *Gleaners, Farmers, and the Failure of Legal Sanctions in England, 1750-1850*, in 125 PAST & PRESENT 116-50 (1989).